UNPUBLISHED OPINION

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

HERBERT H. DEAN,
Plaintiff-Appellant,
vs.
FORD MOTOR COMPANY,
Defendant-Appellee.

NO. 73-3574

MEMORANDUM

[August 13, 1974]

Appeal from the United States District Court for the Northern District of California

Before: KOELSCH and KILKENNY, Circuit Judges, and CRARY,* District Judge.

Herbert H. Dean brought this action pursuant to Title VII of the Civil Rights Act of 1964 (78 Stat. 253), claiming that he was denied a promotion by defendant because of his race. Dean also sought to have the action maintained as a class action. After a hearing, the district court denied certification for the action to proceed as a class action. The cause was then tried as a single plain-

*The Honorable E. Avery Crary, United States District Judge for the Central District of California, sitting by designation.

tiff action. The district court, finding that Dean had not proven that he had in fact made an application for promotion to foreman, entered judgment against Dean and for defendant Ford Motor Company. This appeal followed.

The Supreme Court in *McDonnell-Douglas Corp.* v. *Green*, 411 U.S. 792 (1973), held that in a private, single-plaintiff employment discrimination case,

> "The complainant in a Title VII trial must carry the initial burden under the statute of establishing a prima facie case of racial discrimination. This may be done by showing (i) that he belongs to a racial minority; (ii) that *he applied* and was qualified *for a job for which the employer was seeking applicants*; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications . . . ." *Id* at 802 *(emphasis added)*.
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> "The burden then must shift to the employer to articulate some legitimate, nondiscriminatory reason for the *employee's rejection*." *Id. (emphasis added)*.

The record in this case manifests that the district court correctly applied the rule of *McDonnell-Douglas*. Contrary to the assertion of appellant, the district court properly considered the evidence of both parties in determining whether plaintiff had sustained his initial burden of proving a prima facie case of racial discrimination in employment. The record further shows that the district court did not err in finding that plaintiff had failed to sustain his initial burden of proving that he had in fact made application for promotion to the

position of foreman. Absent such proof, the burden never shifted to the defendant to defend its action by showing some legitimate reason for rejection. Accordingly, the district court was not required to consider the racial employment statistics presented by plaintiff in surrebuttal.

We likewise conclude that the district court was justified on the basis of the record before it, in finding that the requisites for a class action were lacking.

The judgment of the district court is affirmed.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

HERBERT H. DEAN,
Plaintiff,

vs.

FORD MOTOR COMPANY, a Corporation,
Defendant.

COMPLAINT FOR INJUNCTION AND APPROPRIATE AFFIRMATIVE RELIEF

Plaintiff alleges:

I

This action is brought under the provisions of Title VII, Section 706(f) of the Federal Civil Rights Act of 1964.

II

That defendant is a corporation, and it manufactures automobiles at San Jose, California, for sale and distribution in interstate commerce; that it employs approximately 4,000 persons in its San Jose facility.

III

That plaintiff is now and at all times mentioned herein has been an employee of defendant at its San Jose facility; that plaintiff is a citizen of the United States and resides within this Judicial District; that plaintiff belongs to an ethnic group of citizens called Negroes.

IV

That heretofore, during the month of June, 1968, plaintiff applied for a promotion in his employment by defendant to the rank of foreman, but because of his race or color, defendant failed and refused to promote him, and has at all times denied him promotional opportunities because of his race or color, all in violation of Title VII, Federal Civil Rights Act of 1964.

V

That on or about October 8, 1968, plaintiff delivered a complaint with the Equal Employment Opportunity Commission, San Francisco, California charging such discrimination by defendant against him; that said complaint was duly served upon defendant on or about October 23, 1968, and is Equal Employment Opportunity case No. YSF9-078.

VI

That said Equal Employment Opportunity Commission deferred said complaint to the appropriate State Agency on October 15, 1968; that notice of termination of the State Agency's proceedings was received on October 21, 1968, on which date said Equal Employment Opportunity Commission accepted said complaint for filing; that the same was filed within the time allowed by law.

VII

That the Equal Employment Opportunity Commission made a full and complete investigation of said complaint, and on or about November 19, 1970, in case

No. YSF9-078, Decision No. 71 505, held that there is reasonable cause to believe that defendant has engaged in unlawful employment practices in violation of Title VII, Federal Civil Rights Act of 1964, by denying plaintiff and other Negro employees equal opportunity for promotion to the rank of foreman.

VIII

That plaintiff brings this action pursuant to Rule 23, Federal Rules of Civil Procedure, on behalf of himself and all other Negro employees of defendant at its San Jose, California facility who have been likewise unlawfully discriminated against with respect to opportunities for promotion by defendant, in violation of Title VII; that the class so represented is definite and easily ascertainable from the personnel and other records of defendant; that the questions of law and fact are common in the claim of plaintiff and the class, in that each charges discrimination in violation of Title VII; that plaintiff is willing and able to adequately represent the entire class.

IX

That the relief sought by plaintiff and members of the class is the same.

X

That the Equal Employment Opportunity Commission attempted in good faith to obtain voluntary compliance with Title VII by defendant with respect to plaintiff and the class he represents, but defendant refused to comply.

XI

That on or about January 3, 1972, said commission advised plaintiff in writing of such non-compliance, and advised plaintiff that he was authorized to institute this action.

XII

That the facts upon which this action is taken is stated in the Summary of Investigation contained in the Equal Employment Opportunity Commission Decision No. 71 505, dated November 19, 1970, and is set out below:

SUMMARY OF INVESTIGATION

Charging Party was hired by Respondent as an Assembler in July, 1966. He alleges that he applied for and was denied promotion to foreman in November, 1967, and again in June, 1968. He further alleges that he applied for and was denied a transfer to the Cushion Department in February, 1968. Charging Party alleges that he was denied these promotions and transfer because of his race. Several other Negro employees, all of whom had lengthy experience with Respondent, allege that they were also denied promotions to foreman because of their race.

Respondent denies the charge. The evidence indicates that as of 1965 there was only one Negro foreman in the plant. Twelve Negroes have been advanced to foreman positions since 1965. The record shows that the successful Negro applicants had considerably longer service with Respondent than successful Caucasian applicants. The 13 Negroes counted among 350 officials

and managers are all first-line foremen, and there are no Negroes in the upper levels of administration.

The evidence reveals that Respondent's selection system for foreman is based largely upon the recommendations of incumbent foremen. Applicants are neither advised that applications have been received, nor told if they are under consideration for promotion. Moreover, promotion applications are often lost, as were Charging Party's and other Negroes' applications.

This Commission has held that where the proportion of Negro foremen to all foremen is substantially less than the proportion of Negroes to the total plant employment and incumbent foremen's recommendations are required for promotion to that position, the system constitutes an unlawful employment practice where it is used as a strategem for denying promotional opportunities to Negroes or has that effect. (Commission Decision No. 70-94, August 19, 1969.)

In the instant case the number of Negro foremen as well as the application procedures make it reasonable to infer that Respondent's policy has resulted in discrimination against Negro employees. Although several Negroes have been promoted to foremen positions since 1965, the recommendation policy tends to perpetuate the effect of past discrimination and is unlawful unless it serves an overriding legitimate business purpose. Cf., *Local 189, United Papermakers and Paperworkers* v. *United States* 416 F. 2d 980 (5th Cir. 1969).

Charging Party's allegation that Respondent discriminates against Negroes generally, is not supported by the evidence of record. There is no evidence of discrim-

ination with respect to initial hiring, job assignments or termination procedures.

WHEREFORE, plaintiff prays judgment as follows:

1. For an injunction forever enjoining defendant from discriminating against plaintiff and the class he represents.

2. For back wages plaintiff would have earned had he been reasonably promoted to the rank of foreman.

3. For reasonable attorney's fees and costs.

4. For costs of suit herein incurred and for such other and further relief as to the Court seems just and proper.

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Attorney for Plaintiff